Supreme Court, U.S.
FILED
JAN 28 2014
OFFICE OF THE CLERK

Nos. 13-354; 13-356

In The Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents,

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD AND TENTH CIRCUIT

BRIEF OF THE HONORABLE JOSEPH B. SCARNATI III AND THE HONORABLE DONALD C. WHITE, PENNSYLVANIA STATE SENATORS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND PETITIONERS IN NO. 13-356

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Honorable Joseph B. Scarnati III is a four-term Pennsylvania State Senator and serves as the Pennsylvania Senate President Pro Tempore. The Honorable Donald C. White has served in the Pennsylvania State Senate since 2001. These legislators are interested in this case because this Court's decision on who or what qualifies as a "person" who can "exercise" religion for purposes of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act will have a direct impact on the right of Pennsylvania businesses and individuals to exercise their religious beliefs in the course of their vocational and professional lives. It will also impact the prerogative of Pennsylvania and other States to define the purpose and scope of entities created under their laws. These legislators urge this Court to affirm the decision below in No. 13-354 and reverse the decision below in No. 13-356.

SUMMARY OF ARGUMENT

As summarized below, Senators Scarnati and White fully adopt the positions set forth in the *amicus curiae* brief filed by The Rutherford Institute in this case. Because the principles of corporate law that are at stake here are of tremendous importance

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[1] This amicus brief is filed with the parties' consent. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

to businesses, to the individuals who make up those businesses, and to the States that regulate them, the Pennsylvania legislators submit this *amici curiae* brief in support of the free exercise rights of Conestoga and Hobby Lobby and in opposition to the Government's position.

The Third Circuit's opinion is driven by its conception of corporations as machines whose sole purpose is to make money, and an assumption that that fixed purpose disqualifies for-profit corporations from exercising religion. The Court of Appeals, however, ignored the reality that corporations are as varied in their forms and their motives as people are. Secular and religious actions and motivations can, in fact, coexist and mutually inform decisions, whether those decisions are made by an individual or a collection of individuals.

Further, both courts of appeals failed to recognize that the role of determining the scope of rights that may be exercised by corporations properly belongs to the States. The same States that create corporate forms also both enable and require corporations to make moral decisions and to engage in practices that result from those decisions. It follows that to the extent the "morality" giving rise to the decisions is "religious," the practices that result are religious practices. The Third Circuit's opinion assumes that corporations are entities without the capacity for moral judgment. But the States, which created these entities, disagree. In many different areas and increasingly in specific corporate forms, States allow, expect, and often require corporations to exercise moral judgment.

Additionally, not only is an entity's for- or non-profit status not a proxy for whether it may engage in the exercise of religion, the Third Circuit's approach effectively empowers the IRS to determine what entities could come within the scope of Free Exercise protection under the First Amendment by controlling which entities are certified as nonprofits. Such governmental "gatekeeping" is especially offensive to First Amendment principles, which are so vulnerable to loss from content-based restrictions. How can a court justify a categorical rejection of the beliefs, motivation, and conduct of a corporation based solely on whether it has sought and received non-profit status from the Internal Revenue Service? Drawing artificial lines between "secular" and "religious" and between "tax-exempt" and "for-profit" undermines the very purpose of the Free Exercise Clause. The Court of Appeals for the Tenth Circuit saw through these false dichotomies, although even that Court ascribed unwarranted significance to whether a corporation was closely held.

CONCLUSION

For these reasons and those set forth in full in the *amicus* brief of The Rutherford Institute, Senators Scarnati and White respectfully ask this Court to reverse the decision of the Court of Appeals for the Third Circuit in its entirety, and to affirm the result of the Court of Appeals for the Tenth Circuit, and to make clear that the definition of corporate entities, including their ability to exercise religion, remains in the hands of the States.

Respectfully submitted,

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